RESPONDENT'S BRIEF IN SUPPORT OF PETITIONER

Nos. 04-277 & 04-281

SEP 20 2004

IN THE

Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, ET AL.,
Petitioners,

AND

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Petitioners,

v.

BRAND X INTERNET SERVICES, ET AL.,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS BELLSOUTH AND SBC IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Communications Commission is permitted to conclude that broadband Internet access does not include a "telecommunications service" under the Telecommunications Act of 1996, but rather is solely an "information service."

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents BellSouth Corporation, BellSouth Telecommunications, Inc., and SBC Communications Inc. state the following:

BellSouth Telecommunications, Inc. is a wholly owned subsidiary of BellSouth Corporation, a publicly held corporation. BellSouth Corporation has no parent company, and no publicly held company owns 10% or more of its stock.

SBC Communications Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

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THE COURT SHOULD GRANT CERTIORARI BECAUSE THE COURT OF APPEALS DECIDED AN ISSUE OF EXCEPTIONAL NATIONAL SIGNIFICANCE WITHOUT ADHERING TO ESTABLISHED PRINCIPLES OF JUDICIAL REVIEW

This case is critically important to the development of the market for broadband Internet access in the United States. These competitive, fast-evolving services hold vast potential for providing consumers with innovative products and stimulating the nation's economy generally. In section 706 of the Telecommunications Act of 1996 ("1996 Act"), moreover, Congress directed the FCC to facilitate the widespread deployment of broadband facilities. That ambitious goal, however, has remained mired in a patchwork of confused and contradictory regulatory rules that generally predate the 1996 Act, that are predicated on outdated technologies, and that forestall the substantial investment necessary to bring broadband to all consumers.

Recognizing this, the Federal Communications Commission ("FCC" or "Commission") has taken definitive steps towards establishing a coherent regulatory framework that applies equally to all providers of broadband — including not just the cable providers that are petitioners here, but also telephone companies such as SBC and BellSouth — while ensuring that consumers have access to a broad array of information and services. The FCC order at issue here is a key part of that effort. It classifies cable modem service — the leading broadband Internet access service — as an "information service" under the 1996 Act, and it sets the stage for the FCC to construct a coherent broadband regulatory framework around that classification. Indeed, at the same time as it released the order at issue here, the FCC tentatively concluded that the same classification applies to broadband Internet access provided by telephone companies, and it further announced an initiative to develop a policy framework, based on that classification, that "encourage[s] the ubiquitous availability of broadband to all Americans," that "promotes investment and innovation in a competitive market," and

that "is consistent, to the extent possible, across multiple platforms." Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019, 3021-23, ¶¶ 3-6 (2002) ("*Wireline Broadband NPRM*").

The Ninth Circuit's decision below throws that process into disarray. In conflict with the considered judgment of the FCC, it declares that broadband Internet access provided over cable systems includes a "telecommunications service" and is thus subject to common-carrier regulation under Title II of the Communications Act of 1934. By its own admission, moreover, the Ninth Circuit does so on the basis of its own circuit precedent, without affording the FCC the deference called for by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

As petitioners the United States and the National Cable & Telecommunications Association ("NCTA") explain, the Ninth Circuit's conclusion that its own precedent trumps the considered judgment of the FCC is both incorrect and in conflict with other courts of appeals, which is reason enough to grant certiorari. But at least as important is the fact that the court of appeals' decision unhinges a regulatory initiative that affects a critical sector of the nation's economy. This Court's review is necessary to ensure that the FCC's pro-competitive regulatory initiative is evaluated on the merits, pursuant to the principles of administrative review set out in *Chevron*.

A. Today's broadband regulatory environment is out-of-step with the marketplace. The market for broadband Internet access is highly competitive. As the FCC has found, the market is characterized by "a continuing increase in consumer broadband choices" offered over a wide array of transmission platforms, including cable facilities, telephone lines, satellite, fixed wireless, and mobile wireless. *E.g.*, Third Report and Order and Memorandum Opinion and Order, *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency*

Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, 15 FCC Rcd 11857, 11864-65, ¶¶ 18-19 (2000).

Despite the fact that these various transmission platforms compete directly against one another head-to-head in this vitally important market — and have been doing so for years — there remains significant uncertainty as to their regulatory status, including whether competing technologies will be regulated uniformly under federal law. Until the order at issue here, for example, the FCC had not classified cable modem service, which is the leading form of broadband Internet access, much less articulated rules that would apply to that particular service. As a result, cable operators provided cable modem service largely free from any federal regulation, while at the same time contending with the regulatory efforts of state and local franchising authorities. The FCC has been similarly silent with respect to fixed wireless and satellite, creating uncertainty over the potential scope of regulation with respect to those broadband platforms as well.

Meanwhile, the FCC has regulated digital subscriber line ("DSL") service provided by telephone companies — which control barely one-third of the broadband market — as though it were provided in a monopoly environment. Three decades ago, the FCC initiated a proceeding, known as the *Computer Inquiries*, to examine the relationship between the then-nascent computer industry and the public switched telephone network. The various rules that grew out of that proceeding were predicated on the understanding that the public switched telephone network was the exclusive means for transmitting the "ever expanding variety of information" made possible by new "computerized data processing" technologies, as well as the concern that "the telephone industry could use its monopoly of the [telephone] lines to prevent competition from developing." *California v. FCC*, 39 F.3d 919, 923-24 (9th Cir. 1994).

Based on this understanding and concern, the FCC imposed an array of regulatory requirements upon the incumbent telephone companies (such as SBC and BellSouth)

insofar as they wanted to provide so-called "enhanced" (or "information") services. The Commission broadly defined enhanced services to include "any offering over the telecommunications network . . . more than a basic transmission service." Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 420, ¶ 97 (1980) ("*Computer II*"); *see also* 47 C.F.R. § 64.702(a) (defining "enhanced service[s]" as, *inter alia*, services "which employ computer processing applications that act on the format . . . of the subscriber's transmitted information"). And, although the specific rules that governed telephone-company provision of such enhanced services evolved over the next decade, the FCC eventually settled on a regime in which local telephone companies were required to provide the transmission component of their enhanced services to unaffiliated Internet service providers ("ISPs") separately on a common-carrier basis, pursuant to tariff. *See* Report and Order, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 F.C.C.2d 958, 964, ¶ 4 (1986) ("*Computer III*").

As a result, while most competitors could offer enhanced services free from regulation, telephone companies offering such services also were required to offer competing providers a pure transmission service that the FCC could regulate as common carriage — *i.e.*, as a "telecommunications service" — under Title II of the Communications Act.

The *Computer Inquiries* proceeding itself was predicated on the existence of a "one-wire world" in which all enhanced service providers required access to the telephone network. However, as telephone companies in recent years have rolled out competitive *broadband* Internet access services using DSL, the FCC has simply assumed, without ever scrutinizing the issue in any depth, that the *Computer Inquiries* rules apply. *See, e.g.*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24030-31, ¶ 37 (1998) (noting without analysis

"that [Bell Operating Companies ('BOCs')] offering information services to end users of their advanced service offerings, such as xDSL, are under a continuing obligation to offer competing ISPs nondiscriminatory access to the telecommunications services utilized by the BOC information services"). That assumption has resulted in a distorted regulatory regime in which broadband service providers operate free from regulation, unless they happen to be telephone companies that rely upon their own local exchange facilities to provide DSL. In that case alone, the service provider must perform what the FCC has properly termed "radical surgery" in order to offer the underlying broadband transmission path on a common-carrier basis, without the associated Internet access service. FCC Pet. App. 100a-101a (¶ 43).

This haphazard state of regulatory affairs — in which the non-dominant segment of the broadband market is regulated as dominant, while everyone else is left to guess over the rules that will ultimately apply — is significantly inhibiting the deployment of broadband. It has created substantial uncertainty over the extent to which various potential broadband platforms will be subject to regulation, and whether they will compete on a level playing field, thus undermining the certainty that is necessary to warrant the massive investments needed to build-out broadband facilities on a widespread basis.

B. Recognizing the compelling need for reform, the FCC undertook a comprehensive effort to bring uniformity and coherence to the regulation of broadband. The *Declaratory Ruling* at issue here is the first step in that effort. There, the FCC for the first time classifies broadband Internet access provided over cable facilities. It first reaches the unremarkable (and uncontested) conclusion that cable modem service is an "information service" under the 1996 Act. *See* FCC Pet. App. 91a-95a (¶¶ 36-38); *see also* 47 U.S.C. § 153(20) (defining "information service"). It then makes clear that the cable operators that provide this service are not subject to the FCC's *Computer Inquiries* rules, and that — contrary to the Ninth Circuit's prior assumption in *AT&T Corp. v. City of*

Portland, 216 F.3d 871, 878 (9th Cir. 2000) — they (unlike telephone companies) therefore need not separate out a distinct pure transmission service and offer it to unaffiliated service providers on a common-carrier basis. *See* FCC Pet. App. 98a-102a (¶¶ 42-44). And, because the cable operators are not required to offer such pure transmission separately on standardized terms — and because they generally have not elected to do so to date — the FCC also concludes that cable modem service is not a "telecommunications service." *See id.* at 95a-98a, 109a-114a (¶¶ 39-41, 52-55). Instead, in those instances where cable operators do provide unadorned transmission to unaffiliated service providers, they do so as "private carriage." *See id.* at 109a-114a (¶¶ 52-55).

Although the *Declaratory Ruling* is a necessary first step in providing clarity and coherence to the regulation of broadband, it does not stand alone. In three companion notices of proposed rulemaking — one attached to the *Declaratory Ruling* itself, and the others issued some months earlier — the Commission tentatively concluded that DSL-based broadband Internet access service, like cable modem service, would be regulated solely as an "information service," and it further invited comment on a regulatory framework that would apply to *both* DSL-based service and cable modem service. *See id.* at 133a-168a (¶¶ 72-112); *Wireline Broadband NPRM*, *supra*; Notice of Proposed Rulemaking, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd 22745 (2001). Although the notices are broad and the FCC is reviewing a wide variety of proposals, the Commission has articulated principles that will guide its analysis of the questions it has posed. As noted at the outset, the Commission has pledged to "encourage the ubiquitous availability of broadband to all Americans," "promote[] investment and innovation in a competitive market," and regulate "consistent[ly], to the extent possible, across multiple platforms." *Wireline Broadband NPRM*, 17 FCC Rcd at 3021-23, ¶¶ 3-6; *see also* FCC Pet. App. 134a-135a (¶ 73). Thus, before the decision below, the FCC had initiated a comprehensive process with

the goal of bringing much needed certainty and coherence to the regulation of broadband Internet access.

C. The Ninth Circuit's decision creates an ill-considered and unnecessary obstacle to the FCC's reform efforts. The decision correctly holds, consistent with the FCC's order, that broadband Internet access provided over cable is an "information service" under the 1996 Act. But, contrary to the FCC's order, the decision further holds that broadband Internet access provided over cable also includes a "telecommunications service" component that is subject to regulation under Title II of the Communications Act.

The Ninth Circuit's decision is worthy of this Court's review for two reasons. *First*, the *manner* in which the Ninth Circuit reached its decision is out-of-keeping with well-established principles of judicial review of administrative action. Believing itself bound by its prior *City of Portland* decision — in which the Ninth Circuit unnecessarily and incorrectly opined on the statutory classification of cable modem service — the Ninth Circuit expressly refused to apply *Chevron*. In effect, then, the Ninth Circuit disregarded the views of the FCC, the expert agency Congress has charged with interpreting and implementing the 1996 Act in the first instance, and arrogated to itself the responsibility of setting national telecommunications policy. That approach is wrong, and, as the United States and NCTA explain, it is in conflict with decisions of other courts of appeals. Certiorari will thus enable this Court to resolve a circuit split on the appropriate role of circuit precedent in reviewing the reasonableness of subsequent agency decisions.

Second, and at least as important, the *effect* of the Ninth Circuit's decision is to undermine the FCC's efforts to create coherent regulatory policy for broadband. As the United States properly notes, the aim here is to create a broadband policy framework that is "consistent across multiple platforms." FCC Pet. 27 (internal quotation marks omitted). Accordingly, the Ninth Circuit's decision, in addition to unraveling the FCC's efforts with respect to broadband Internet access over cable, threatens to undo the Commission's efforts

to create a regulatory framework for broadband generally. Indeed, in the wake of that decision, *all* of the FCC broadband regulatory proceedings noted above have come to a screeching halt, leaving in place the uncertainty that has already plagued this critically important market for close to a decade. This Court's review is necessary to ensure that the lawfulness of the FCC's plan for eliminating that uncertainty is determined not on the basis of a Ninth Circuit precedent in a case to which the FCC was not even a party, but rather on its merits, pursuant to the principles set out in *Chevron*.

CONCLUSION

The Court should grant the petitions for a writ of certiorari.

Respectfully submitted,

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